

**Regional Import and Export Trucking Co., Inc.,
Regional Distribution & Warehousing Service,
Inc., Newport Transportation Co., Inc. and
Fernando Sanches**

**Truck Drivers Local Union No. 807, a/w Inter-
national Brotherhood of Teamsters, Chauff-
eurs, Warehousemen and Helpers of America,
AFL-CIO and Fernando Sanches and Local
No. 819, a/w International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and
Helpers of America, AFL-CIO, Party in Inter-
est. Cases 22-CA-14582 and 22-CB-5544**

July 11, 1997

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On March 31, 1997, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent Union filed exceptions, a supporting brief, and a Motion for Reconsideration of the Board's Original Backpay Order; the General Counsel filed exceptions and a supporting brief; the Charging Party filed exceptions, a supporting brief, and an answering brief; and the Respondent Employers filed an answering brief and a Motion to Reconsider.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs² and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.³

¹No exceptions were filed to the judge's findings that discriminatee Frank Rizzo's backpay did not toll when he was rehired by the Respondent Employers in August 1986, and that the Respondents are required to pay his medical expenses.

²The Respondent Union has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³In their respective exceptions, the Charging Party and the General Counsel contend that the judge, in setting forth the amounts of backpay due discriminatee Frank Rizzo (no "J"), erroneously substituted discriminatee Frank J. Rizzo's backpay figures for Frank Rizzo's backpay figures. We find merit to the General Counsel's and the Charging Party's exceptions and correct the judge's inadvertent error in the Order. We also correct the judge's finding in sec. III.(a), par. 7, of his decision that the Respondent Employers have already paid Rizzo \$21,341 pursuant to the arbitration award. The actual amount either paid or agreed to be paid pursuant to the arbitration award is \$29,493.

The Charging Party also excepts to the judge's finding that the Respondent Employers have "already paid" Frank Rizzo the backpay amount due to him under the arbitration award. The Charging Party argues that the record contains no evidence that any discriminatee has been fully paid pursuant to the arbitration award. We agree with the Charging Party's exceptions and find that the Respondent Employers have either paid or agreed to pay Frank Rizzo the amount due to him under the arbitration award.

The judge found that the payments made by the Respondent Employers pursuant to an arbitration award should be offset against the Respondent Employers' share, and not the Respondent Union's share, of the amounts owed pursuant to the Board's Order in the underlying unfair labor practice case, *Regional Import Trucking Co.*, 292 NLRB 206 (1988), enf'd. 914 F.2d 244 (3d Cir. 1990).⁴ In so finding, the judge rejected the Respondent Union's argument that its backpay liability should be offset by the payments made by the Respondent Employers pursuant to the arbitration award because of the Respondent Union's efforts in obtaining that arbitration award.⁵

In its exceptions, the Respondent Union reiterates its contention that one or more of its alternative offset methods should be adopted by the Board. The Respondent Union's four alternative offset methods are: (1) that its backpay liability be absolved, at least in the first instance, because it obtained an arbitration award, and it should only be liable for any portion of the backpay award if the Respondent Employers are unable to pay the full amount; (2) that if any backpay is assessed against the Union in the first instance, it should only be assessed backpay for "similarly situated" discriminatees Donald Grosskranz and Nelson Morales who were omitted from the arbitration decision; (3) that if any backpay is assessed against the Respondent Union, it, and not the Respondent Employers, should receive a full credit and offset for the arbitration award amounts paid by the Respondent Employers; or (4) the money paid by the Respondent Employers should be divided equally between it and the Respondent Employers for offset purposes.

For the reasons set forth below, we find the Respondent Union's exceptions to be without merit. In its exceptions, the Respondent Union asserts that its alternative offset methods are not inconsistent with the Board's past decisions in this case. We disagree. In the underlying unfair labor practice case, the Board found, inter alia, that the Respondent Union should be jointly and severally liable for the losses to the discriminatees, along with the Respondent Employers, because its breach of its duty of fair representation contributed to the discriminatees' loss of pay. That Order was enforced by the United States Court of Appeals for the Third Circuit. Here, the Respondent Union's proposed offset methods (1) and (2) are, in effect, an attempt to modify the Board's Order and absolve the Respondent Union of its backpay liability. The Board and the Court of Appeals for the Third Circuit rejected that ar-

⁴The judge offset the arbitration award from the money owed by the Respondent Employers, and found that the Respondent Employers' remaining backpay liability, after payment in full of the arbitration award, is \$96,840.50, plus interest, and that the Respondent Union's total backpay liability is \$438,316.50, plus interest.

⁵As set forth below, the Respondent Union offered four alternative offset theories.

gument in the underlying case and we reject it again now.

Because the Respondent Union's offset methods (1) and (2) would effectively require a modification of the Board's 1988 Order, we do not have jurisdiction to adopt them. Under Section 10(e) of the Act, on the filing of the record with the court of appeals, the jurisdiction of the court of appeals is exclusive and its judgment and decree is final, subject to review by the Supreme Court. *Haddon House Food Products*, 260 NLRB 1060 (1982). Here, as noted above, the Board's Order has already been enforced and accordingly we no longer have jurisdiction to modify that Order. The Third Circuit's decision enforcing the Board's finding of joint and several liability is the law of the case and we cannot now absolve the Respondent Union from that liability. For these reasons, we reject the Respondent Union's offset methods (1) and (2) and deny the Respondent Union's motion to reconsider and modify the 1988 Order.⁶

The Respondent Union also contends that the Board should adopt its offset methods (3) and (4) because it vigorously processed the grievance and obtained an arbitration award that made whole the discriminatees. The Respondent Union argues that because of its effort and money spent in pursuing the arbitration award, it should receive credit for the amounts obtained as a result of those efforts. We reject the Respondent Union's argument.

In the underlying proceedings in this case, the Board consistently refused to defer to the arbitration procedure because the interests of the Respondent Union were adverse to those of the discriminatees. In *Regional Import & Export Trucking*, 306 NLRB 740 (1992), the Board denied the Respondent Union's motion for reconsideration of the Board's refusal to defer to arbitration. At that point in the proceeding, the Board's Order had been enforced by the Third Circuit, and the Regional Director had just issued a compliance specification and notice of hearing setting forth the amounts of backpay due the discriminatees. The Respondent Union argued, inter alia, that the damages sustained by the employees should be established through the contractual grievance-arbitration procedure rather than through the Board's compliance procedure. The Board, noting that "both of the parties to the arbitration, the Employers and the Union, are jointly and severally liable under the terms of the Board's order" for the backpay due to the discriminatees, found that "[c]learly, in these circumstances, where both parties

to the arbitration have interests adverse to the Charging Party/grievant, deferral to arbitration is inappropriate." The Board stated that "[w]here, as here, the only parties to the arbitration proceeding are the very parties who committed the unfair labor practices, we cannot confidently rely on the arbitration proceeding to afford a full remedy for the unfair labor practices." 306 NLRB at 741.⁷ Similarly, in 1994, Respondent Regional filed a special appeal to the Board following Administrative Law Judge Morton's denial of the Respondent Employers' motion to defer to the arbitration award. On July 8, 1994, the Board affirmed Judge Morton's denial of the motion to defer for substantially the same reasons set forth in the Board's 1992 decision reported at 306 NLRB 740.

In sum, the Respondent Union was on notice, on the basis of our previous refusals to defer the issues in this case to arbitration, that we contemplated determining joint and several liability through our own processes under our remedial order. Our reasons for refusing to defer were stated in those decisions and we adhere to them. The Respondent Union's joint and several liability was based on the unusual circumstances of this case in which the Respondent Union's violation of the Act involved more than merely a failure to represent employees fairly in the face of unlawful employer actions; it involved affirmative acts by the Respondent Union to undercut the employees' interests. The Respondent Union may derive some benefit from its efforts in obtaining an arbitration award in that after the Respondent Employers' payment of the amount ordered in arbitration, the Respondent Union will not face the prospect of becoming liable for the entire amount due in the event of future circumstances that render the Respondent Employers unable to pay. We do not agree, however, that the Respondent Union should be allowed to reduce its own "joint" liability by subtracting all or part of the Respondent Employers' payments from the half of the total amount which the Respondent Union is properly obligated to pay. Accordingly, we adopt the judge's finding that the Respondent Union's liability is, in the first instance, half of the total liability as set forth in the Third Amended Specification.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Employers, Regional Import and Export Trucking Co., Inc., Regional Distribution & Warehousing Service, Inc., Newport Transportation Co., Inc., Jersey City, New Jersey, their officers, agents, successors, and as-

⁶ The Respondent Employers, in their Motion to Reconsider, contend that if the Board grants the Respondent Union's motion to modify the original backpay order, the Board should also reconsider its earlier rulings refusing to defer to the arbitration award. In light of our denial of the Respondent Union's motion, we deny the Respondent Employers' motion as well.

⁷ The Board also found that the Respondent Union was attempting to defer issues previously litigated in the unfair labor practice proceeding which was enforced by the Third Circuit.

signs, and the Respondent Union, Truck Drivers Local Union No. 807, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1.

"1. Frank Rizzo's net back wages and medical expenses are \$30,179 (plus interest) and \$17,937, respectively. The total net backpay owed to Rizzo is \$48,116, plus interest."

Bernard S. Mintz, Esq., for the General Counsel.
James J. Dean, Esq., for the Respondent Employer.
Richard Seltzer, Esq., for the Respondent Union.
Kent Y. Hirozawa, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

I. STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on December 12, 1996, pursuant to a third amended backpay specification issued by the Regional Director for Region 22, on August 27, 1996.

Although the third amended specification included contentions regarding C. Lampkin and C. Walker, these were settled before the hearing opened and were removed from the litigation.¹ In addition, the third amended specification and additional amendments made at the hearing, set out certain minor adjustments in the distribution of regular and overtime hours to the discriminatees in accordance with the formula approved by the Board and as a result of further investigation. There is no disagreement about the data, although R. J. Rizzo's net backpay will be determined by whether he was fully reinstated by the Employer in August 1986. Accordingly, there remained for consideration only three issues, which are:

1. Whether an employee named Frank Rizzo² should have his backpay tolled when he was offered and accepted reemployment in August 1986. The question here is whether F. Rizzo was offered his former position of employment.

2. Whether the Employer is obligated to pay certain medical expenses that F. Rizzo incurred during the backpay period.³

¹ The parties agreed that the backpay for C. Walker was \$32,949, plus interest. The parties also agreed that back wages owed to C. Lampkin was \$11,460, plus interest, and that medical expenses he was owed equaled \$847, plus interest.

² All parties agree that the person involved here is Frank Rizzo and not another employee whose name is Frank J. Rizzo.

³ This issue was disposed of in the first backpay decision issued by Administrative Law Judge Morton. Thus, although it was raised again before me, I reject the contention that because F. Rizzo has not actually paid certain of his medical bills, the award should not recompense him for these expenses. For one thing, there was no showing that the medical care providers have waived any claims they may have against F. Rizzo, and nothing would prevent them from seeking to collect such moneys after he obtains his backpay as a result of this proceeding.

3. To what extent, if any, should certain moneys paid by the Employer in satisfaction of an arbitration award, be applied to the Union's liability, which was found in the underlying case, to be joint and several.

II. THE PRIOR PROCEEDINGS

The initial case was tried before Administrative Law Judge Robert Snyder in November and December 1986. This resulted in a decision by him on February 29, 1988, and a decision by the Board at 292 NLRB 206, on December 30, 1996. In pertinent part, that decision made the following conclusions.

Regional Import and Export Trucking Co., Inc. (RIE) was founded in or about 1965 and was engaged in the pick up and delivery of freight. Regional Distribution and Warehousing Service, Inc. (RDW) was formed in 1974 to operate out of Secaucus, New Jersey, and to perform warehousing and distribution services. In 1978 or 1979, the operations of the two companies were combined into a single location in Jersey City, New Jersey.

Truck Drivers Local Union No. 807, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 807 IBT) has been the bargaining representative of RIE's drivers, helpers, platform men, checkers, and warehousemen since the late 1960s. At some point in the 1970s, the Union became the representative of RDW's drivers, hi-lo operators, and platform men.

On or about February 7, 1986, the principles of RIE and RDW formed a new company called Newport Transportation Company (Newport). The judge and the Board concluded that Newport was an alter ego of those first two related companies. The Board also concluded that during the period from February to July 1986, as RIE and RDW were transferring accounts to Newport, they discriminatorily discharged the drivers, hi-lo operators and platform employees who had been employed by RIE and RDW at the Jersey City facility. The judge, with Board approval, concluded that these discharges were motivated by a scheme to avoid the Respondent's obligations under the existing collective-bargaining agreement with Local 807. It also was concluded that there were 27 named individuals who were unlawfully discharged and that there might be other employees, similarly situated, who would be entitled to backpay and reinstatement.⁴

In addition to the above, the Board concluded that Local 807 had arbitrarily ignored a grievance concerning the creation of Newport and the concomitant discharge of employees. The Board concluded that this failure to represent employees covered by its collective-bargaining agreement, constituted a violation of Section 8(b)(1)(A) of the Act. Moreover, it did so even though the Union eventually did file for arbitration against the Employer. In this regard, the judge noted:

It was not until charges were filed against the Union that it first filed a demand for arbitration of the underlying dispute. That proceeding has not been pursued with rigor but it cannot serve to shield the Union from responsibility for its crass and blatant undermining of

⁴ Frank Rizzo, along with many of the other platform workers, was laid off on June 27, 1986, and his backpay period commenced on June 28, 1986.

the rights of the unit employees for who it acts as fiduciary.

As a remedy, the Board found that the Union should be jointly and severally liable with the Employer to make whole the unlawfully discharged employees. In this respect, the Board specifically rejected Local 807's argument that the remedy vis-a-vis the Union, should be limited to a cease and desist order and that the Union should not be jointly and severally liable for backpay. The Board also rejected the Union's contention that the matter should be deferred to arbitration.

On August 23, 1990, the court of appeals enforced the Board's Order. *NLRB v. Truck Drivers Local 807*, 914 F.2d 244 (3d Cir. 1990).

In the meantime, on September 2, 1986, the Union filed a demand for arbitration and, as noted above, the Board decided not to defer the unfair labor practice case to arbitration. The Employer refused to submit the dispute to arbitration and the Union filed a lawsuit to compel arbitration in the eastern district of New York. In December 1990, the district court denied the Union's Motion for Summary Judgment, in part because of the NLRB's refusal to defer to arbitration.

However, on September 24, 1991, the Second Circuit Court of Appeals reversed and ordered the Employers to arbitrate. *Truck Drivers Local 807 v. Regional Import & Export*, 944 F.2d 1037 (2d Cir. 1991). The court stated in part:

More importantly, the present circumstances differ from those that existed when the matter was before the Board and do not indicate that Local 807 will be unable to represent fairly the apparently conflicting interests of the Regional and Newport employees. The conflict of interest presented to the Board involved allegations that Local 807 had aligned itself with Newport against the Regional employees. Presently, however, Local 807 seeks from the arbitrators an award of backpay for both the Regional and Newport employees, it does not seek to replace the Newport employees with Regional employees. All of the displaced Regional employees have been reinstated. Additionally, even assuming the taint of some conflict, the parties have agreed to establish a procedure at the arbitration proceeding that will allow Sanches' attorney to participate fully; and we have full faith in the ability of the arbitrators to avoid any conflict.

On October 15, 1991, the Regional Director for Region 22 issued a compliance specification and notice of hearing which set out claims for backpay. On October 28, 1991, the Union, having obtained the above-noted Order compelling arbitration, moved for reconsideration of the Board's initial Order (at 292 NLRB 206), to the extent that the Board had denied deferral of the "backpay" dispute to the contractual grievance-arbitration procedure. On March 20, 1992, the Board, at 306 NLRB 740, denied the Union's motion and therefore set the stage for the first compliance hearing. The Board stated:

Having duly considered the matter, we deny the Union's motion. First, to the extent the Union is seeking deferral of the issues previously litigated in the underlying unfair labor practice proceeding, in agreement

with the General Counsel we find deferral of those issues inappropriate. where, as here, the administrative law judge, the Board, and the Third Circuit have all issued their decisions in that proceeding, the fact that the Second Circuit has subsequently issued an order effectively compelling arbitration of the Charging Party's grievance cannot serve to require the Board to reconsider its prior ruling and retroactively defer to that process. To hold otherwise would ignore not only the extensive administrative and judicial resources that have been invested in litigating and deciding the unfair labor practice case, but also the further delay that would necessarily result in remedying the Respondents' unfair labor practices were the issues in that case now to be deferred.

Second, we also find it inappropriate to defer the issues currently being raised in the compliance proceeding to arbitration. Assuming *arguendo* that it would be appropriate to defer compliance proceedings to arbitration in some circumstances, we do not find it appropriate to do so in the instant case. Here, both of the parties to the arbitration, the Employers and the Union are jointly and severally liable under the terms of the Board's order for the backpay due the Charging Party and other discriminatees.

As a consequence of the above, a backpay hearing began before Administrative Law Judge Jim Morton, on June 11, 1992, and continued at various times until September 29, 1994. During this period, the backpay specification was amended several times. It should be noted that two additional persons were alleged to be discriminatees, and backpay claims were made for them in addition to the 27 persons named in the original decision. (These are Donald Grosskranz and Nelson Morales.)

During the course of the Board hearing, Arbitrator Robert E. Light issued an opinion and award on September 3, 1993, and made certain findings including:

1. That RIE and RDW violated the collective-bargaining agreement by transferring accounts to Newport which is an alter ego.
2. That the employers have offered reinstatement to 27 employees who were discharged.
3. That the employers should pay backpay for the 27 individuals (in a formula omitted here), and that the Employers should make certain payments on their behalf to the Pension and Welfare Funds.
4. That no interest would be required on any backpay.

The Arbitrator set out the backpay amounts due to each individual and fixed the pension and welfare payments due to the funds. He also established a schedule for payments. Although the amounts determined by the arbitrator are significantly less than what is claimed as the total net backpay due herein, the amounts are nevertheless substantial. As of the time of the hearing before me, the Employers, in accordance with the arbitration award, had paid or agreed to pay \$365,888 for lost wages and \$40,639 for pension obligations.

On February 7, 1995, Judge Morton issued a decision in the backpay case, in which among other things, he adopted a formula which essentially measured backpay for the discriminatees based on the aggregate hours worked by replacement employees who were employed by Newport.

On August 25, 1995, the Board issued its decision at 318 NLRB 816. Although affirming most of Judge Morton's conclusions, the Board remanded certain aspects for additional evidence and findings. In this respect, the Board remanded on the following issues.

1. To allow the Respondents to put in evidence showing that Frank Rizzo was reemployed by the Employer. The question to be determined was whether Rizzo's backpay should be tolled as a result of his alleged reemployment.

2. To determine the proper amount of interim earnings to be deducted from the backpay of Christopher Walker as a result of his employment by Universal Trucking and his employment by his father.

3. To recompute the backpay for Charles Lampkin to determine what amount of supplemental income should not be included in his interim earnings.

4. To determine whether payments made by the Employer pursuant to the arbitration award should properly serve as an offset to the amount of backpay owed. In this respect the Board stated:

Based on the record, we are unable to determine whether the arbitration award payments made by the Respondent Employer should properly serve as an offset from the amounts owed under this Order. Accordingly, we shall remand this issue for further compliance proceedings for a determination of whether those payments represent a remedy for the same losses involved in the instant case. In the event those payments are found to remedy the losses involved here, those amounts shall be treated as a offset against the amounts due under the terms of this Order. [318 NLRB at 819.]

At footnote 10, the Board also noted: "We do not pass on the effect of such payments by the Respondent Employer on the liability of the Respondent Union. This issue shall be resolved in further compliance proceedings."

On August 27, 1996, the Regional Director issued a third compliance specification and this was amended to a limited degree at the hearing in the present case.

III. THE DISPUTED ISSUES

At the outset of the present hearing, the parties resolved the issues involving Christopher Walker and Charles Lampkin. Therefore, the issues relating to those two individuals are no longer in dispute and are not considered in this decision.

A. Frank Rizzo

F. Rizzo was originally employed as a platform man at the Jersey City facility. In this regard, his job consisted of using a hi-lo to load or unload trucks. Because he was the third most senior of about 14 platform workers, F. Rizzo worked continuously with few if any lost days. He, along with other platform workers, were discharged on June 27, 1986, after which the work that was being done at the Jersey City facility was transferred to Newport. In this regard, the evidence shows that Newport employed people who did the same work that Rizzo had done before his discharge.

In August 1986, F. Rizzo heard that RIE might have some work at a facility in North Arlington, New Jersey. When he approached RIE's dispatcher, Jerry Elia, Rizzo was told that

that he could be employed as a helper but that this was "heavy work" and that it would be available for 2 to 3 days a week. Rizzo accepted the job and began work during the week ending August 9, 1986.

Unlike his previous job, the work that Rizzo was called on to do was to go along with trucks making delivery of appliances (such as refrigerators), and take them from the truck to the residences where they were to be installed. This clearly was work that was much more physically demanding than what he had done before his discharge. Moreover, the record establishes that during the brief time that he worked (from August to late October 1986), he usually worked 2 or 3 days a week instead of the 40 hours per week that he normally worked before. Thus, his earnings at this new job were substantially below what they were before his unlawful discharge. Further, the Employer cannot maintain that it could not have reinstated Rizzo to his former job inasmuch as the evidence showed that replacement workers were hired at Newport to do platform work.

F. Rizzo testified that he was again laid off by the Respondent in October 1996 and sought other employment thereafter. It appears that he became disabled in February 1988 and was therefore no longer available for work. (The specification seeks backpay for F. Rizzo only up through the first quarter of 1988.)

Because the evidence shows that F. Rizzo was not reinstated to his former position of employment or that his former position was unavailable at the time of his rehire, it is concluded that his hiring in August 1986 did not toll his backpay. *A.P.A. Warehouses, Inc.*, 307 NLRB 838 (1992); *Brown, Inc.*, 305 NLRB 62, 66 (1991); and *Boland Marine & Mfg. Co.*, 280 NLRB 454 (1980).

Additionally, for the reasons set forth above in footnote 3, I reject the contention that the Respondents should not be required to pay the amount of money claimed in the specification for Rizzo's medical expenses.

Based on the above, it is concluded that the net back wages owed to F. Rizzo are \$28,932, plus interest, and that the amount for medical expenses due to him is \$2006, plus interest, for a total of \$30,938, plus interest. As set forth in the amended appendix I to the third amended backpay specification, the Employer has already paid F. Rizzo \$21,341 pursuant to the arbitration award.

B. The Offset Allocation Issue

The issue here involves the question of giving credit where credit is due.

In the original unfair labor practice case, the Board held, in substance, that the Union had failed and refused, for arbitrary reasons, to process a grievance regarding the transfer of work from Respondents RIE and RDW to Newport, and the concomitant discharge of bargaining unit employees. Notwithstanding various contentions of the Union, including the evidence that the Union, after the charge had been filed, was seeking to have the issues arbitrated, the Board held that the Employer and the Union were to be jointly and severally liable for backpay. This Order was enforced by the Court of Appeals for the Third Circuit.

Having compelled the Employer to arbitrate the discharges of the employees involved in the unfair labor practice case, the Union obtained an arbitration award in the amounts of \$365,888 for back wages and \$40,639 for pension contribu-

tions on behalf of 27 individuals whom the arbitrator found to have been discharged without just cause. As noted above, the arbitrator did not award interest. The employer has either paid all of this award or has made arrangements to pay it all.

The General Counsel and the Employer take the position that since the Employer has paid the money, it should be entitled to offset that money from the amount it still owes. This would mean, from the Employer's point of view, that it would initially be liable for one half of the net backpay, with the possibility of owing the other half if Union was unable to pay its share. However, as the Employer has already paid a large sum of money, the General Counsel agrees with the Employer's argument that the Employer should be solely credited with the amount it paid which should therefore be deducted from the net backpay that the Employer still owes.

Having obtained relief for 27 out of the 29 discriminatees by way of arbitration, the Union suggests that it should get credit for the moneys paid by or to be paid by the employer in compliance with arbitration award.

In cases involving a union's duty of fair representation, the Board has awarded backpay against a union where, for example, the grievance was time-barred as of the date of the Board's decision. In such a case, the Board has ordered a union to pay the backpay that the employee would have obtained if the grievance had been meritorious. *Service Employees Local 579 (Beverly Manor Convalescent Center)*, 229 NLRB 692, 696 (1977); *Steelworkers (InterRoyal Corp.)*, 223 NLRB 1184 (1976). In some cases, the Board has given a union the opportunity to persuade the employer to waive the time limits to consider the grievance and if the union is successful in that regard, the Board has held that backpay will be tolled if the union actually processes the grievance with due diligence or if the employer redresses the grievance. *Laborers Local 324 (Centex Homes of Cal.)*, 234 NLRB 367 (1977), enfd. denied 591 F.2d 1344 (9th Cir. 1979); *Manganero Masonry Co.*, 230 NLRB 640 (1997); *Service Employees Local 579 (Beverly Manor Convalescent Center)*, supra, *Steelworkers (InterRoyal Corp.)*, supra.⁵

There are, however, other cases where the Board has awarded backpay without giving a union the opportunity to persuade the employer to consider an untimely filed grievance. *King Soopers*, 222 NLRB 1011 (1976); *Glaziers Local 1204 (P.P.G. Industries)*, 229 NLRB 713 (1977), enfd. denied 579 F.2d 1057 (7th Cir. 1978). In cases where the employer's discharge of employees was a violation of the Act, as well as a violation of the contract, and the union unlawfully refused to process a grievance, the employer will be ordered to reinstate the employees while the employer and the union will be held jointly and severally liable for any backpay. *Pacific Coast Utilities Service*, 238 NLRB 599 (1978), enfd. 638 F.2d 73 (9th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB 1470 (1978), enfd. in part and denied in part 631 F.2d 263 (4th Cir. 1980). In these cases, and unlike the cases described in the preceding para-

graph, the Board did not make any provision to allow the unions to toll their backpay liability if they were successful in prosecuting the grievances.

In the present case, the Board, in the underlying unfair labor practice decision, found the Employers and the Union to be jointly and severally liable for the backpay. The Board, specifically noting *Pacific Coast Utilities Service*, supra, did not make any provision that would allow the Union to toll its portion of the backpay if it processed the grievance to arbitration, or if it managed to obtain reinstatement for the discharged employees.

The Union takes the following alternative positions.

1. That it should be absolved, at least in the first instance, from making any payments because it successfully went to arbitration and obtained an award against the Employer. It asserts that it should only be liable for any portion of the backpay award if the Employer is unable to pay the full amount.

2. That if any backpay is assessed against the Union in the first instance it should only be for employees Donald Grosskranz and Nelson Morales as these were omitted from the arbitration decision.

3. That if any backpay is assessed against the Union, it should receive a full credit and offset for the amounts paid by the Employer pursuant to the arbitration award and the Employer should not receive any offset for the money it paid.

4. That the money paid by the Employer should be divided equally between the Union and the Employer for offset purposes.

All of the alternatives posited by the Union are unacceptable as they would, in effect, overturn the Order in the underlying unfair labor practice case. Nor do I think that it is reasonable for the Union to receive credit for moneys paid by the Employer.

It is evident to me that the principle wrongdoer in this case was the Employer, who discharged a group of employees in order to avoid its bargaining obligations to the Union. In my opinion, the Union, while initially indifferent to these unlawful actions, did ultimately press the matter to arbitration, but only after an unfair labor practice charge had been filed against it. (I would surmise that the Union's attorney, realizing the potential liability involved, persuaded the Union that it could not ignore the grievance.) Thus, although being dragged into performing its fiduciary obligations vis-a-vis the employees, the Union did in fact pursue the arbitration and ultimately gained substantial success in that forum.

Notwithstanding the comments above, it is not within my authority to modify the original backpay Order which does not allow, in my opinion, any of the alternatives suggested by the Union. If the Union wants to be given some kind of monetary credit for pursuing and obtaining the arbitration award, I am afraid that it will have to ask the Board to reconsider and modify the original Order in light of the subsequent events.

C. Recalculations

The third amended backpay specification made new calculations regarding the distribution of regular and overtime hours for various of the discriminatees. These were made in accordance with the original formula found appropriate by Judge Morton and after reviewing records. There is no dispute regarding the underlying data from which the calcula-

⁵For example, in *Steelworkers (InterRoyal Corp.)*, supra, the Board required the union to make the individual whole for any losses suffered as a result of her discharge from the date of her discharge until the earliest of such time as she was reinstated by the employer, or obtained substantially equivalent employment, or the union secured consideration of her grievance by her employer and thereafter pursued it with due diligence.

tions are made and the results are summarized in first amended appendices I and J. These appendices were introduced into evidence as General Counsel's Exhibits 3(a) and (b).

Amended appendix I is a list of each of the 29 discriminatees and sets forth the net backpay due to him (based on the recalculations), any medical expenses owed to him, and the amount paid or to be paid to him by the Employer pursuant to the arbitration award.

Amended appendix J is a list of each of the discriminatees, setting forth the amount of pension money due to each, the amount paid or to be paid by the employer pursuant to the arbitration award and the total balances due by the employer and by the Union. I should note that the General Counsel stated that he is not seeking any interest on the pension monies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondents, Regional Import and Export Trucking Co., Inc., Regional Distributing & Warehousing Service Inc.,

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Newport Transportation Co., Inc., and Truck Drivers Local Union No. 807, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, their officers, agents, successors, and assigns, shall make payments to the discriminatees in accordance with the following conclusions.

1. Frank Rizzo's total net backpay, exclusive of interest, is \$30,938.

2. The total amount of the Employers' remaining backpay liability is, in the first instance, \$96,840.50, plus interest, to be allocated to the discriminatees based on the formula set forth in paragraph 4(k) of the third amended specification and the figures set forth in first amended appendix I.

3. The total amount of the Union's backpay liability is, in the first instance, \$438,316.50, plus interest, to be allocated to the discriminatees based on the formula set forth in paragraph 4(l) of the third amended specification and the figures set forth in first amended appendix I.

4. The total for the pension amounts due are \$133,005, of which \$25,863.50 is owed by the Employers and \$66,502.50 is owed by the Union. No interest is owed on these amounts.

5. In the event that either the Union or the Employers are unable pay all or any portion of their respective share of the backpay, each will continue to be liable for the total amount of any unpaid backpay which is due to the discriminatees.

6. To the extent that any of the discriminatees have not received a valid offer of reinstatement, backpay shall continue to run on their behalf.